DEC 1 0 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. ~~596~~ 34

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Utah, Central Division.

BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
WILLIAM E. MARX,
P. O. Box 351,
Los Angeles, Calif. 90053,
Attorneys for Appellant, Southern California Edison Company.

Of Counsel:
SENIOR & SENIOR,
RAYMOND T. SENIOR,
FRANCIS M. GIBBONS.
10 Exchange Place,
Salt Lake City, Utah.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

Page

I.

Argument in opposition to the contentions in the motion to dismiss filed by the Solicitor General 1

Preliminary statement relating to Government's motion 1

Edison's position comes within FRCP Rule 24 2

A. Representation by Government is inadequate 2

B. Edison has no other recourse 5

Edison's interests are adversely affected 7

The Federal Power Commission cannot resolve antitrust issues 12

Edison denied opportunity to present evidence 12

This court's plenary power can and should be invoked here 13

Miscellaneous 14

II.

Argument in opposition to the contentions in the motions to dismiss or affirm filed by El Paso Natural Gas Company 16

Preliminary statement relating to El Paso's motions 16

El Paso's contention that the order of the District Court denying Edison's application for leave to intervene is interlocutory and not reviewable is without merit 17

Page

El Paso's contention that Edison was not entitled to intervene in the proceedings below and that its application for leave to intervene in the proceedings below was untimely is without merit 24

El Paso's assertion that Edison's appeal was not from the decree of the District Court ordering divestiture is without merit 30

El Paso's contention that Edison was accorded all the rights of a party by the court below is without merit 32

Miscellaneous 33

Conclusion 35

TABLE OF AUTHORITIES CITED

Cases	Page
Allen Calculators, Inc. v. Nat. Cash Register Co., 322 U.S. 137, 88 L. Ed. 1188	17, 19, 20, 21, 32
Brotherhood of R.R. Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519, 91 L. Ed. 1646	15, 33
Brown Shoe Co. v. United States, 370 U.S. 294	19
California v. Federal Power Commission, 369 U.S. 482, 8 L. Ed. 2d 54	12
Continental Ins. Co. v. United States, 259 U.S. 156, 66 L. Ed. 871, 42 S. Ct. 540	13, 14, 19, 23, 32
Ford Motor Co. v. Bisanz Bros., Inc., 249 F. 2d 22	7, 22, 23
Missouri-Kansas Pipe Line Co. v. United States, 108 F. 2d 614	24
Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 85 L. Ed. 975	15, 17, 18, 24
Pellegrino v. Nesbit, 203 F. 2d 463	30, 33
Sam Fox Publishing Co. v. United States, 366 U.S. 683, 6 L. Ed. 2d 604, 81 S. Ct. 1309	2, 6, 15, 17, 18, 22, 23
Sutphen Estates v. United States, 342 U.S. 19, 96 L. Ed. 19	2, 15, 17, 18, 22, 23
United States v. DuPont DeNemours & Co., 366 U.S. 316, 6 L. Ed. 2d 318, 81 S. Ct. 1243	13, 19, 23
United States v. El Paso Natural Gas Company, et al., 376 U.S. 651, 12 L. Ed. 2d 12, 84 S. Ct. 1044	6, 8, 26, 31
United States v. Radio Corporation of America, 186 F. Supp. 776	21

Page

Wolpe v. Poretsky, 144 F. 2d 505, cert. den. 323 U.S. 777 ..... 30, 33

Wometco Television & Theatre Co. v. United States, 355 U.S. 40 15

Rules

Federal Rules of Civil Procedure, Rule 24 ..... 7, 20, 25

Federal Rules of Civil Procedure, Rule 24(a) 17, 20, 21, 22, 23, 25, 31

Federal Rules of Civil Procedure, Rule 24(a)(1) .. 25

Federal Rules of Civil Procedure, Rule 24(a)(2) 2, 25, 26

Federal Rules of Civil Procedure, Rule 24(a)(3) .. 7, 25

Federal Rules of Civil Procedure, Rule 24(b) 17, 20, 21, 22, 25, 31

Rules of the Supreme Court, Rule 16 1

Statute

United States Code Annotated, Title 28, Sec. 2101-(b) 32

Textbook

Charles Dickens, "Oliver Twist" (1944, Dodd, Mead & Company ed.), Ch. 5, p. 520, line 2 11

IN THE

Supreme Court of the United States

October Term, 1965
No. 596

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,

Appellees.

BRIEF OF SOUTHERN CALIFORNIA EDISON COMPANY IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM.

I.

Argument in Opposition to the Contentions in the Motion to Dismiss Filed by the Solicitor General.

Preliminary Statement Relating to Government's Motion.

The Motion filed on behalf of the United States by the Solicitor General (hereinafter referred to as the "Government") to Dismiss the Appeal of Southern California Edison Company (hereinafter referred to as "Edison") refers to Rule 16 of the Rules of this Court, as does El Paso Natural Gas Company (hereinafter referred to as "El Paso") in its Motion. In contrast, however, to the position of El Paso, the Government's Motion recognizes that under appropriate circumstances third parties are entitled to intervene in government

antitrust cases (Government's Motion, page 4), and it, of course, would follow that when intervention is sought under such circumstances third parties are entitled to judicial review by this Court, under the Expediting Act, of a denial of such intervention. There is no question but what the decisions of this Court, cited by Appellant as well as El Paso and the Government,[1] recognize the law to be such. The contentions of the Government in its Motion to Dismiss are predicated upon its conclusion that the factual situation involved in this case does not fall within the scope of such rule. We shall therefore proceed to review the factual circumstances here involved to demonstrate the error of such conclusion.

Edison's Position Comes Within FRCP Rule 24.

The Government recognizes that FRCP Rule 24(a)-(2) authorizes intervention "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action"[2] but proceeds to assert, contrary to the facts, that "Neither of these elements is present here".[3] This assertion is patently erroneous:

A. Representation by Government Is Inadequate.

From the time that the Department of Justice abandoned its opposition to most of the serious antitrust defects of the El Paso proposed plan of divestiture and entered into a stipulation effectively terminating its right of appeal from the proceedings below,

---

[1] *Sam Fox Publishing Co. v. United States*, 366 US 683, 6 L.Ed. 2d 604, 81 S. Ct. 1309; *Sutphen Estates v. United States*, 342 US 19, 96 L.Ed. 19; Cf. Edison's Jurisdictional Statement, pp. 5, 18; El Paso's Motions, pp. 4, 6; Government's Motion, pp. 4, 7-8.

[2] Government's Motion, pp. 4-5.

[3] Ibid, p. 5.

thereby foreclosing it from bringing before this Court the question of compliance of the proposed divestiture plan with this Court's mandate, the representation of the appellant's interest by existing parties became wholly inadequate.

The Government's objections all during the trial to the El Paso plan, i.e. that it did not provide for a new company which would be a strong competitor for El Paso in the California market,[4] encompassed both (1) the failure of the El Paso plan to provide a new company of such corporate independence that it would have the *will* to compete,[5] and (2) the failure of the El Paso plan

---

[4]See Plaintiff's (Government's) Brief After Divestiture Hearings, p. 1 wherein it stated:

"In general, the object sought by the Government has remained constant throughout these proceedings. We seek to reconstitute Pacific Northwest Pipeline Corporation — or New Company — as a viable pipeline, able to serve its markets and able to expand to serve other markets. We seek to re-establish this company in such a way as to enable it to offer competition to El Paso for the California market and elsewhere." (Emphasis added.)

[5]See Plaintiff's (Government's) Brief Opposing Defendant El Paso's Plan of Divestiture, filed January 6, 1965, p. 2, wherein the Government states:

"We believe that the El Paso Plan of Divestiture fails to provide for appropriate relief. Instead it tends to perpetuate the very anti-competitive effects this litigation was intended to prevent."

and Plaintiff's (Government's) Brief After Divestiture Hearings, filed February 19, 1965, pp. 2-3, as follows:

". . . Just as the Supreme Court found that the spin-off proposed in *Union Pacific* was 'a proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company' (475) so here also, El Paso's proposed spin-off is no more than a proposition to perpetuate the domination and control by El Paso Natural Gas Company over the Pacific Northwest Pipeline Corporation."

* * *

". . . This knowledge that direct competition with El Paso would probably endanger its own shareholders' interests,

(note continued on next page)

to provide a new company with *ability* to compete for the California market by means of an equitable allocation of the assets and restoration of pre-existing contract rights.[6]

In entering into the stipulation, after the conclusion of the divestiture trial proceedings on February 4, 1965, the Department of Justice completely abandoned all effort to deal with the issues relating to the failure of the El Paso plan to provide a new company with *ability* to compete *for the California market,* and the subsequent stipulation failed to resolve the antitrust issues involved therein.

The Government suggests that Edison's argument in this regard amounts to little more than an assertion that it could represent the public interest better than the Government. This contention is clearly in error be-

---

would tend to dampen any desire of New Company's management to compete vigorously for El Paso's markets. That plan would thereby defeat the very object of this divestiture which is to re-establish New Company as a vigorous competitor."

[6]Plaintiff's (Government's) Memorandum, filed January 6, 1965, On Divestiture Of A Portion Of The San Juan Gas Reserves Acquired Since The Merger, pages 6-8:

". . . Moreover, to permit El Paso to preclude Pacific Northwest (New Company) from obtaining any part of those reserves, which are the closest to the California market, would be to permit it to impede through that device the ability of the New Company to serve the California market and thus permit these reserves to be 'utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends' of the illegal merger, . . ." (Emphasis added.)

". . . As has been shown, to permit El Paso to retain all of these reserves would allow it to retain the fruits of its illegal conduct. It would also give to El Paso a decided advantage in competing to serve new increments of demand in the California market, and thus would fail to restore the competitive status quo as it existed at the time of the merger." (Emphasis added.) See also footnotes 13 and 48, *supra.*

cause we are not here involved with a subsequent stipulation which, by means of a settlement compromising related matters, resolved all of the antitrust issues raised. As pointed out in Appellant's Jurisdictional Statement[7] the objections which were abandoned by the Department of Justice were, by their nature, not capable of being withdrawn without sacrificing this Court's mandate. The question concerned with the appropriate manner of the disposition of the stock of the New Company, as to which the Government secured a minor alteration of El Paso's proposed plan, obviously relates only to the issue of the New Company's *will* to compete. In contrast, the abandoned issues concerning the disposition of the assets and physical properties and restoration of contract rights relate to the *ability* of the New Company to compete. No arrangement with respect to the "spin-off" of the stock in the New Company, however successful in establishing an independent *will* to compete for the California market, could cure the debilitating weaknesses imposed upon the New Company by the abandonment of the issues concerned with its *ability* to compete for such market.

B. Edison Has No Other Recourse.

The effect upon the Appellant of a judgment, in the form of that approved by the District Court in this case, is equally clear. In this connection, the gravamen of the offense of El Paso, as heretofore determined by this Court in its mandate requiring divestiture without delay, was that the merger with Pacific Northwest eliminated that company as an independent competitive force seeking to supply the California market for natural gas. The abandonment by the Government of the issues relating to the effect of the El Paso proposed plan of

[7]Edison's Jurisdictional Statement, p. 21.

divestiture upon the ability of the New Company to compete for the California market and the resulting judgment by the District Court (whose view was that this Court's mandate would be met by a proposal designed to effect "a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso"),[8] would obviously bind Edison to essentially the same *absence* of competition, insofar as El Paso and the New Company are concerned, as existed after the illegal merger which was condemned by this Court in *United States v. El Paso Natural Gas Company,* 376 U.S. 651, 654, 12 L. ed. 2d 12, 16, 84 S. Ct. 1044. Appellant is not here in the position of the would-be intervenors in the *Sam Fox Publishing Co.* case, cited by the Government,[9] where the court recognized that if the effects of the consent decree were to impinge upon their business operations they would not be bound by the judgment and therefore would have adequate additional protective remedies at law and that, under the circumstances of that case, there was "no rule or policy requiring them to press their claim *against* ASCAP in this government litigation." See *Sam Fox Publishing Co. v. United States,* 366 US 683, 694, 6 L.ed 2d 604, 612.

From the time the Department of Justice entered into the stipulation abandoning the aforesaid antitrust issues, it placed the Government in a position which would preclude it from any appeal necessary to bring before this Court any question as to whether or not the decree complied with the mandate of this Court, and

---

[8]Divestiture Hearing Transcript for December 10, 1964, at pp. 620-1.

[9]Government's Motion, p. 4.

obviously it could not thereafter be deemed to be in a position to adequately represent anyone falling within the scope of Rule 24 who believed, as does Edison, that the decree of the District Court violates the mandate of this Court. The hard practical fact is that, if Appellant is not permitted by means of this appeal to bring before this Court for its review the decree in this case (which results, as heretofore pointed out, in the same absence of competition insofar as El Paso and the New Company are concerned, as existed after the illegal merger[10] and which Edison believes is contrary to the mandate of this Court) it will have no other legal remedy available to it and will be bound by the effects of the decree. Cf. *Ford Motor Co. v. Bisang Bros., Inc.*, 249 F.2d 22, 27-28.

Edison's Interests Are Adversely Affected.

The Government further recognizes that FRCP Rule 24(a)(3) provides for intervention "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court" but asserts that Appellant has failed to show that the alleged adverse effect of the disposition is "imminent and onerous" rather than "speculative".[11] In addition to the effects, referred to above, of this decree upon Appellant, which we submit are properly classified as both imminent and onerous if review is not forthcoming, it should, we believe, suffice to point out that this Court did not consider the interests of Appellant, to which it specifically referred in its decision ordering divestiture, to be so speculative. For example, in its decision this Court stated:

---

[10]Cf., District Court's concept of mandate, Divestiture Hearing Transcript for December 10, 1964, at pp. 620-1.

[11]Government's Motion, p. 6.

". . . In 1956 it [Pacific Northwest] indeed engaged in negotiations for the sale of natural gas to Southern California Edison Co. (Edison). The latter, largest industrial user of natural gas in Southern California, used El Paso gas, purchased through a distributor. It had, however, a low priority from that distributor being on an 'interruptible' basis, i.e., subject to interruption during periods of peak demand for domestic uses. Edison wanted a firm contract and, upon being advised that it was El Paso's policy to sell only to distributors, started negotiations with Pacific Northwest in May 1956." (376 U.S. 651, 654-5, 12 L. Ed. 2d 12, 16).

* * *

". . . Edison took its problem to Pacific Northwest and, as we have seen, a tentative agreement was reached for Edison to obtain Pacific Northwest gas. El Paso responded, offering Edison a firm supply of gas and substantial price concessions." (376 U.S. 651, 659, 12 L. Ed. 2d 12, 18).

* * *

"Pacific Northwest had proximity to the California market — 550 miles distant in Wyoming, even nearer in Idaho, only 250 miles away in Oregon. Moreover, it had enormous reserves in the San Juan Basin, the Rocky Mountains, and Western Canada. Had Pacific Northwest remained independent, there can be no doubt it would have sought to exploit its formidable geographical position vis-a-vis California." (376 U.S. 651, 661, 12 L. Ed. 2d 12, 19).

See *United States v. El Paso Natural Gas Company*, 376 US 651, 12 L. Ed. 2d 12.

The Government asserts "There is no reason to believe that the decree will not accomplish its avowed purpose of establishing an independent and competitive New Company".[12] In the light of the position, which was constantly maintained by the Department of Justice during the hearing, *i.e.*, that one of the principal purposes of this Court's mandate was to re-establish the competitive situation for the California market,[13] a number

---

[12]Government's Motion, p. 7.

[13]Typical of the repeated expressions of concern by the Government, prior to its entering into the stipulation, for the restoration of competition for the California market are the following:

a. Plaintiff's (Government's) Brief After Divestiture Hearings, filed February 19, 1965, page 1:

> "In general, the object sought by the Government has remained constant throughout these proceedings. We seek to reconstitute Pacific Northwest Pipeline Corporation—or New Company—as a viable pipeline, able to serve its markets and able to expand to serve other markets. We seek to re-establish this company in such a way as to enable it to offer competition to El Paso for the California market and elsewhere." (Emphasis added.)

See also *Ibid.* pages 11, 12, 13, 14, 15, 25, and 27-8.

b. Plaintiff's (Government's) Brief Opposing El Paso's Plan of Divestiture, filed January 6, 1965, pages 13-14:

> "In order that New Company will be in a position to compete for a share of the California market it must have at its command gas reserves in excess of what is proposed to be turned over to it by El Paso through the divestiture proceeding." (Emphasis added.)
>
> * * *
>
> "The Supreme Court referred in its opinion to the location of the gas reserves of Pacific Northwest in relation to the potential California market and stated that had Pacific Northwest remained independent it no doubt would have sought to exploit its formidable geographical position vis-a-vis California." (Emphasis added.)
>
> * * *
>
> "It would seem indisputable that a divestiture in accordance with the intent and purpose of the Supreme Court, in holding that El Paso had unlawfully acquired the stock of Pacific Northwest because such acquisition had the effect of lessening competition, must result in restoration of New

(note continued on next page)

of inquiries, including the following, may be legitimately made concerning the significant *omission* in the above statement and elsewhere in the Government's Motion of any reference to the California market.

1. What happened to the concern of the Department of Justice over the restoration of competition for the California market?

Company to substantially the same position it had prior to acquisition, i.e., of having enormous gas reserves in the San Juan Basin strategically located with respect to the California market. El Paso should not be permitted, in purported compliance with the decision of the Supreme Court, to place the New Company at a disadvantage insofar as being a potential competitor in the California market through denying New Company its fair share of the additional gas reserves which have been developed during the intervening eight years when El Paso had complete control of the acquisition by Pacific Northwest of gas reserves in the San Juan Basin." (Emphasis added.)

c. Plaintiff's (Government's) Memorandum, filed January 6, 1965, On Divestiture Of A Portion Of The San Juan Gas Reserves Acquired Since The Merger, pages 6-8:

". . . Moreover, to permit El Paso to preclude Pacific Northwest (New Company) from obtaining any part of those reserves, which are the closest to the California market, would be to permit it to impede through that device the ability of the New Company to serve the California market and thus permit these reserves to be 'utilized as part of the conspiracy to eliminate or suppress competition in furtherance of the ends' of the illegal merger . . ." (Emphasis added.)

* * *

". . . As has been shown, to permit El Paso to retain all of these reserves would allow it to retain the fruits of its illegal conduct. It would also give to El Paso a decided advantage in competing to serve new increments of demand in the California market, and thus would fail to restore the competitive status quo as it existed at the time of the merger." (Emphasis added.)

d. See also Plaintiff's (Government's) Memorandum, filed February 4, 1965, Summarizing The Condition Of Pacific Northwest At The Time Of Its Merger With El Paso, pages 1, 2, 10, 12-15 and Plaintiff's (Government's) Proposed Findings Of Fact And Conclusions Of Law, filed February 19, 1965, pages 4 and 9.

2. Is it now the position of the Government that this Court's mandate was designed to effect "a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso"?

3. If so, what factors or developments persuaded the Government representatives to change their position from that taken during the trial?

4. If not, and there is no change in position involved, what persuaded them during the trial to take the repeated position that the restoration of competition in the California market was envisaged by the Court's mandate?

5. If, under the appropriate antitrust principles to be applied to such a situation, it is appropriate to have "a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso," what was wrong with the merger, *i.e.*, how did it tend to reduce competition any more than such a division of the country and markets effected by the District Court's decree?

6. Are they trying to prove that Mr. Bumble was really right about the law after all?[14]

We believe such omission by the Government of any reference to the California market to be most significant because *no one could reasonably suggest that the decree will re-establish an independent company competitive in the California market,* and certainly the Government has not done so.

---

[14]See Charles Dickens, "Oliver Twist" (1944, Dodd, Mead & Company edition), Ch. 5, page 520, line 2.

The Federal Power Commission Cannot Resolve Antitrust Issues.

In connection with the footnote citation on page 3 of the Government's Motion concerning the Federal Power Commission and the certificate proceedings now pending before that Commission, it should be recognized: (1) that the application filed by the New Company to which the Government refers does *not* seek to serve any portion of the California market; (2) that if the New Company shows sufficient market and reserves and financial soundness to render service to the limited areas it seeks to serve the Federal Power Commission could not properly deny it certification; (3) as the Government pointed out in its own Brief After Divestiture Hearing, filed February 19, 1965, if the New Company, with the reserves allocated to it under the El Paso plan, were to seek to serve the California market, the inadequate reserve allocation would result in a deliverability life which would fall "far below any accepted level permitted by the Federal Power Commission";[15] and (4) that the Federal Power Commission in any such certificate proceedings would not have jurisdiction to order a different allocation of the properties or reserves as between El Paso and the New Company from that decreed by the District Court.[16]

Edison Denied Opportunity to Present Evidence.

The argument in paragraph 3 on page 7 of the Government's Motion might suggest to one unfamiliar with the record that Edison had been permitted to participate and had produced all data thought available on the is-

---

[15]Plaintiff's (Government's) Brief After Divestiture Hearing, filed Feb. 19, 1965, p. 14.

[16]That antitrust considerations take precedence over regulatory considerations and that the Federal Power Commission has no jurisdiction over the former has been established, see *California v. Federal Power Commission*, 396 US 482, 486-490, 8 L.Ed. 2d 54, 58-60.

sues in the case. In contrast, however, the record demonstrates that Edison's application to intervene was denied and that if permitted to intervene Edison proposed to show by evidence "that under the proposed plan of divestiture covered by the aforesaid stipulation New Company would not be in a position to compete as effectively for the California market as the Pacific Northwest Pipeline Corporation would have been but for El Paso Natural Gas Company's illegal merger with it."[17]

This Court's Plenary Power Can and Should Be Invoked Here.

The Government's argument in paragraph 4 on page 7 of its Motion appears to suggest that, since Edison was denied intervention and was not a party to the case, it has no standing to attack the divestiture decree and no appropriate way to invoke this Court's plenary power to determine whether its mandate has been complied with. Is it the position of the Government that, even in cases where it had stipulated to an antitrust decree, which did not in fact result in compliance with a mandate of this Court, there is no appropriate way for those adversely affected by such noncompliance to bring such question to this Court for review? If this were the law, then obviously this Court's mandates could easily be circumvented in such cases by such a stipulation—in clear contradiction to the rule in the *Continental Insurance Company* case. (*Continental Ins. Co. v. U.S.*, 259 U.S. 156, 166, 66 L.ed. 871, 881, 42 S. Ct. 540 (1922) and *United States v. DuPont De-Nemours*, 366 U.S. 316, 325, 6 L.ed. 2d 318, 324-325, 81 S. Ct. 1243 (1961)). We submit that the legal

[17]Recognition of the fact by counsel for El Paso appears at Transcript of June 24, 1965, p. 17.

principles applicable to such review are clear and are as follows:

(1) Even if the assertion of the Government in its Motion that this was a case in which the Appellant had been properly denied intervention were assumed to be true (contrary to the fact), this Court would not, we submit, be powerless, as the Government's Motion suggests, to invoke its plenary power to determine whether its mandate had been complied with; (2) the stipulation entered into by the Department of Justice does not and could not circumvent this Court's power to see that its mandate is carried out. As stated by this Court in *Continental Ins. Co. v. U. S.*:

> ". . . we have jurisdiction to consider on our own motion whether our mandate has been complied with. We delegated to the district court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree, in any proper way, is brought to our attention, to see that it follows our opinion". See *Continental Ins. Co. v. U. S.*, 259 US 156, 166, 66 L.Ed. pp. 871, 882.

Miscellaneous.

Inasmuch as the cases relied on by the Government are, for the most part, the same as those referred to by El Paso, we will, in the interests of brevity, discuss the cases relied on by both the Government and El Paso in the following portions of our response dealing with El Paso's Motions. In this connection, and in contrast to El Paso, it may be pointed out that the Government raises no question as to the timeliness of Edison's petition.

Our review of the other cases cited by the Government discloses that they are, in each case, inapplicable or do

not support the Government's position herein. In one instance the case cited (*Wometco Television & Theatre Co. v. United States,* 355 US 40) merely records a *per curiam* affirmation of the district court's order (not dismissal of the appeal, as indicated by the Government's Motion, page 4) on an appeal from the United States District Court for the Southern District of New York and a diligent research effort to locate a reported lower court order or decision from which such appeal was taken has proved fruitless. The case of *Brotherhood of R.R. Trainmen v. Baltimore & Ohio Railroad Co.,* 331 US 519, referred to on page 7 of the Government's Motion, is, we believe, consistent with the *Sam Fox Publishing Co.* case and the *Sutphen Estates* case and supports appellant Edison's right to intervene in the instant proceeding and right to appeal. In that case, the Court, after discussing permissive right to intervene as not constituting a basis for the applicant's intervention in that case, stated:

> "But where a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definitiveness which supports an appeal therefrom. See *Missouri-Kansas Pipe Line Co. v. United States,* 312 US 502, 508, 85 L. Ed. 975, 981, 61 S. Ct. 666." (See *Brotherhood of R.R. Trainmen v. Baltimore & Ohio Railroad Co.,* 331 US 519, 524, 91 L. Ed. 1646, 1650.)

II.

Argument in Opposition to the Contentions in the Motions to Dismiss or Affirm Filed by El Paso Natural Gas Company.

Preliminary Statement Relating to El Paso's Motions.

The Motions of El Paso to dismiss Edison's appeal from the proceedings below or to affirm the District Court's denial of Edison's application for leave to intervene are, in their simplest terms, based on the following contentions (all of which are without merit):

1. That the order of the District Court denying Edison's application for leave to intervene is interlocutory and not reviewable;[18]

2. That Edison was not entitled to intervene and that its application for leave to intervene was untimely;[19]

3. That Edison's appeal was not from the decree of the District Court ordering divestiture;[20] and

4. That said decree of divestiture is now final.[21]

Neither El Paso in its Motions nor the Government in its Motion has questioned the plenary power of this Court to see that its mandate is carried out when a question of compliance is brought to its attention in any proper way, and they must, therefore, be taken to have conceded this fact. Additionally, then, and for this purpose, the Court need only ask: "Has the asserted failure of the District Court in carrying out this Court's

---

[18]El Paso's Motions, pp. 3-5.
[19]Ibid, pp. 5-8.
[20]Ibid, p. 3.
[21]Ibid, p. 3.

mandate been brought to this Court's attention in any proper way?" We submit that not only was Edison wrongfully denied intervention but that this appeal is the only recourse open to Edison for relief from such improper denial of its right to intervene and is an appropriate way to bring the question of the decree's compliance with the Court's mandate to the attention of this Court.

El Paso's Contention That the Order of the District Court Denying Edison's Application for Leave to Intervene Is Interlocutory and Not Reviewable Is Without Merit.

Edison's petition to intervene was made *inter alia* as a matter of right under FRCP Rule 24(a). If El Paso's contention, that an order denying such petition is interlocutory and nonreviewable, had any merit there could be *no* appeal from any such denial of intervention to would-be intervenors in *any* antitrust proceeding subject to the Expediting Act. This is simply contrary to the law. The cases are clear that such denial of an application to intervene made as a matter of right, whether under FRCP Rule 24(a)[22], or otherwise,[23] or the denial of intervention constituting an abuse of discretion of the Court when permissive intervention is sought under FRCP Rule 24(b)[24] are reviewable by the United States Supreme Court under the Expediting Act. The very existence of the case reports[25] cited by

---

[22] *Sam Fox Publishing Co. v. United States*, 366 US 683, 6 L.Ed. 2d 604; *Sutphen Estates v. United States*, 342 US 19, 96 L.Ed. 19.

[23] *Missouri-Kansas Pipe Line Co. v. United States*, 312 US 502, 85 L.Ed. 975.

[24] *Allen Calculators, Inc. v. Nat. Cash Register Co.*, 322 US 137, 88 L.ed. 1188.

[25] *Allen Calculators, Inc. v. Nat. Cash Register Co.*, 322 US 137, 88 L.Ed. 1188; *Sam Fox Publishing Co. v. United States,*

(note continued on next page)

both respondents refutes El Paso's arguments against any reviewability of orders denying intervention since all of the cases cited, including those in which it was ultimately determined, on the particular facts there involved, that the appeals should be dismissed, involved a review by the Court of the orders denying intervention. The case of *Missouri-Kansas Pipe Line Co. v. U.S.*, 312 US 502, 85 L.ed. 975, is a clear holding that the denial of intervention to an applicant to intervene entitled to intervention as of right is appealable and that the jurisdiction of this Court will be exercised to correct the error of the Court below in denying intervention. The denial of intervention by the District Court in that case was reversed by this Court on appeal. The principle involved is succinctly set forth by this Court in the *Sam Fox Publishing Co.* case (366 US 683, 688, 6 L.Ed. 2d 604, 608) as follows:

> "As the Government and appellants correctly agree, the controlling question on the issue of jurisdiction, the answer to which also determines the merits of this appeal, is whether the appellants were entitled to intervene in these proceedings as 'of right.' Sutphen Estates, Inc. v. United States, 342 US 19, 96 L ed 19, 72 S Ct 14, where the Court said: 'If appellant may intervene as of right, the order of the court denying intervention is appealable.' Id. 342 US p. 20. That case requires rejection of ASCAP's separate contention that the order below was not appealable because not final, and also its further contention that appellate review of intervention has become moot, in that no

366 US 683, 6 L.Ed. 2d 604; *Sutphen Estates v. United States*, 342 US 19, 96 L.Ed. 19; *Missouri-Kansas Pipe Line Co. v. United States*, 312 US 502, 85 L.Ed. 975.

appeal was taken from the judgment eventuating from the proceedings in which intervention was sought. *The latter contention is based on the erroneous hypothesis that review of the intervention order was obtainable only in connection with an appeal from such judgment.*" (Emphasis added.)

In the instant case the fact is that the decree of divestiture had been entered by the District Court at the time the notice of Edison's appeal had been filed and Edison, in its notice of appeal and supporting jurisdictional statement, specifically raised the issue of the compliance of such decree of divestiture with the mandate of this Court as one of the questions presented in this appeal. Furthermore, even where an appeal is not taken from the decree, itself, an appeal from an order denying intervention can and should, under circumstances where, as here, the decree is entered prior to the time the appeal is taken, be treated by this Court as an appeal from the decree. *Allen Calculators, Inc. v. Nat. Cash Register Co.*, 322 US 137, 88 L.Ed. 1188. Certainly where, as here, the decree has been entered prior to filing the appeal and the issue of the adequacy of the decree in meeting the earlier mandate of this Court is specifically raised in the appeal, there can be no question that the latter issue may appropriately be considered by this Court in reviewing the case on appeal. *United States v. DuPont De Nemours & Co.*, 366 US 316, 6 L.Ed. 2d 318; *Continental Ins. Co. v. United States*, 259 US 156, 66 L.Ed. 871.

The case of *Brown Shoe Co. v. United States*, 370 US 294, cited by El Paso on page 4 of its Motions, does not hold to the contrary and merely bears on the question of the statutory purpose and consequence of

the Expediting Act and the reasons for the nonreviewability of interlocutory orders. It does not support El Paso's position here nor does it involve the question of whether the denial of intervention by a district court is an interlocutory or final order for purposes of determining reviewability. That case did not even involve a question of intervention, and does not in any way purport to deal with, let alone dispose of, the question of denial of intervention as being final versus interlocutory action by the lower court.

The other cases cited by El Paso as support for its argument, that orders denying intervention in antitrust cases are interlocutory in nature and therefore not reviewable, are equally inapplicable to the instant proceeding or have been misconstrued by El Paso. In the *Allen Calculators, Inc.* case, 322 US 137, 88 L.Ed. 1188 (cited by Edison in support of its position that abuse of discretion by the District Court in denying permissive intervention to Edison under FRCP Rule 24(b) rendered such order appealable under the Expediting Act),[26] this Court, while recognizing the appealability of an order denying intervention to which a would-be intervenor might be entitled to as a matter of right under FRCP Rule 24(a), or when denial constitutes an abuse of discretion in refusing intervention under FRCP Rule 24(b), merely concluded as a factual matter, *after a review of the entire record,* that the appellant in that case had not brought itself within FRCP Rule 24. At the same time, this Court recognized very clearly that, in view of the fact that the appeal from the denial of intervention in that case followed the entry of a final decree on the merits, the Expediting Act required such

[26]Edison's Jurisdictional Statement, p. 18.

appeal from denial of intervention to be treated as an appeal from the final decree on its merits.[27] In the *Allen Calculators, Inc.* case, this Court clearly *did not,* contrary to El Paso's contention, decide against reviewability of an order denying intervention when such intervention would have been proper under FRCP Rule 24(a); at the same time this Court *did,* in that case, clearly recognize that an order denying permissive intervention under FRCP Rule 24(b) would be appealable to this Court, under the Expediting Act, when a clear abuse of discretion is shown.[28] This latter proposition is the one for which Edison cited the case in its Jurisdictional Statement.[29]

The case of *United States v. Radio Corporation of America,* 186 F. Supp. 776, cited by El Paso[30] in support of its argument that orders denying intervention in antitrust cases have been uniformly held by this Court to be nonreviewable, likewise does not support the proposition for which it is cited. That particular District Court opinion involved only the carrying out of a consent decree agreed to by the Department of Justice and Radio Corporation of America in litigation before the District Court. Westinghouse sought to intervene claiming certain proposed transactions of Radio Corporation of America would violate the consent decree, but intervention was denied. The District Court was of the opinion that Westinghouse would not have been bound by such a decree and could, in contrast to

---

[27] *Allen Calculators, Inc. v. Nat. Cash Register Co.,* 322 US 137, pp. 142-143, 88 L.Ed. 1188, 1192.

[28] *Ibid,* 322 US 137, 142, 88 L.Ed. 1188, 1192.

[29] At page 18.

[30] El Paso's Motions, p. 4.

Edison in the case at bar, have sought relief independently if it were aggrieved by such proposed transactions. The case cannot, on any basis, be appropriately cited as authority that denial of intervention sought under FRCP Rules 24(a) or (b) is not reviewable by this Court on appeal. Furthermore, there was no mandate of this Court involved in that case and thus no question raised as to whether such a mandate was being carried out by the consent decree.

Nor is El Paso's attempted short-shrift treatment of the cases cited by Edison in support of its appeal persuasive. El Paso claims the cases cited are either inapplicable or held against reviewability. The three cases[21] Edison cited in support of the propriety of its intervention in the proceedings below under FRCP Rule 24(a) all involved appeals from the denial of intervention in district court proceedings and all three orders denying intervention were, in fact, reviewed by this Court. The mere fact that the Court in two of those cases[22] ultimately upheld the denial of intervention by the lower court on the particular facts before it in those cases does not alter the fact that they were reviewed, nor is it in any way determinative of the issues in the instant proceeding on the particular facts here involved. This Court's action and principles enunciated in those two cases, when applied to the facts of the instant case, clearly, we submit, support (1) the appealability of the

---

[21] *Sam Fox Publishing Co. v. United States,* 366 US 683, 6 L.Ed. 2d 604; *Sutphen Estates v. United States,* 342 US 19, 96 L.Ed. 19; *Ford Motor Co. v. Bisang Bros., Inc.,* 249 F. 2d 22.

[22] *Sam Fox Publishing Co. v. United States,* 366 US 683, 6 L.Ed. 2d 604; *Sutphen Estates v. United States,* 342 US 19, 96 L.Ed. 19.

denial of intervention to Edison in the proceedings below[33] and (2) a reversal by this Court of the District Court's denial of such intervention.[34] The third case[35] cited by Edison in support of its right to intervene under FRCP Rule 24(a) was *Ford Motor Co. v. Bisanz Bros., Inc.* While not an Expediting Act case, it did involve the right of intervention under the Rule and the position of the appellant, the denial of whose intervention by the District Court was reviewed and overturned by the appellate court in that case, was closely analogous to that of appellant Edison in the instant proceeding. In both cases the would-be intervenor had an interest in the disposition and use of the property subject to the jurisdiction of the Court and as a practical matter would be bound by the disposition made of such property because no independent relief was available.[36] El Paso asserts no peculiar aspect of Expediting Act cases, nor have we discovered such in our own review of the cases, which would change the result in the *Ford Motor Co.* case had it been an Expediting Act case.

As to the other cases cited by appellant Edison in support of its appeal, the *Continental Ins. Co.* case, 259 US 156, 66 L.Ed. 871, and *DuPont* case, 366 US 316, 6 L.Ed. 2d 318, both were cited in support of Edison's position that this Court has plenary jurisdiction to see that its earlier mandate is carried out and that such ju-

---

[33]"If appellant may intervene as of right, the order of the court denying intervention is appealable." *Sutphen Estates v. United States,* 342 US 19, 20, 96 L.Ed. 19, 23. Accord. *Sam Fox Publishing Co. v. United States,* 366 US 683, 687-8, 6 L.Ed. 2d 604, 608.

[34]That Edison is prejudiced see pp. 2-12 above and Edison's Jurisdictional Statement, pp. 7-20.

[35]*Ford Motor Co. v. Bisanz Bros., Inc.,* 249 F.2d 22.

[36]*Ford Motor Co. v. Bisanz Bros., Inc.,* 249 F. 2d 22, 27-28.

risdiction could not be defeated or circumvented by any stipulation between El Paso and the Department of Justice.[37] El Paso does not question the authority of those cases for those propositions; nor does the Government.[38] The last decision cited by Edison and "dismissed" summarily by El Paso was the Circuit Court of Appeals' decision in *Missouri-Kansas Pipe Line Co.* case 108 F.2d 614, and was only cited by Edison to show the propriety of Edison's direct appeal to this Court under the Expediting Act rather than to the Court of Appeals. However, the later appeal in that same case[39] is unequivocal authority for the reviewability of orders denying intervention which the would-be intervenor is entitled to as a matter of right. In that case this Court reversed the District Court's order denying intervention which the intervenor was entitled to as a matter of right *and in the face of the position of the Attorney General that the decree satisfied the public interest and the expressed desire of the Government to sustain the action of the Court below without further litigation.*[40]

El Paso's Contention That Edison Was Not Entitled to Intervene in the Proceedings Below and That Its Application for Leave to Intervene in the Proceedings Below Was Untimely Is Without Merit.

El Paso claims that the basis for intervention asserted by Edison is its dissatisfaction with the position the Attorney General has taken on behalf of the

---

[37]Edison's Jurisdictional Statement, pp. 21-22.

[38]Government's Motion, p. 7.

[39]*Missouri-Kansas Pipeline Co. v. United States,* 312 US 502, 85 L.Ed. 975.

[40]Ibid., 85 L.Ed. 975, at pp. 980-982.

United States.[41] El Paso then goes on to assert that Edison does not and could not claim a right to intervene under the subsections of FRCP Rule 24 dealing with a statutory right to intervene or an interest in property under control of the District Court (presumably referring to FRCP Rules 24(a)(1) or 24(a)(3)). El Paso nowhere specifically refers to subsections (a) or (b) of Rule 24 FRCP and appears not to have considered at all Edison's right to intervene under Rule 24(a)(2).[42] The latter assertion by El Paso is contrary to Edison's notice of appeal and jurisdictional statement, both of which make clear Edison's assertion of the right to intervene under FRCP Rules 24(a)(2) *and* (3) and the right to permissive intervention under FRCP Rule 24(b). Then, without indicating the asserted lack of basis for Edison's intervention under either FRCP Rule 24(a)(3) or FRCP Rule 24(b), El Paso proceeds to attack Edison's application for leave to intervene in the proceedings below on the grounds said application lacked timeliness, conveniently ignoring Edison's obvious basis for intervention under both FRCP Rules 24(a)(2) and 24(a)(3)[43] and the reasons why permissive intervention under FRCP Rule 24(b) would likewise have been proper and the denial thereof an abuse of discretion by the District Court under that rule. Without extending this brief by repetition of the more detailed analysis in our Jurisdictional Statement, we believe it will suffice to reiterate our position as stated therein that Edison has a legally protectible interest in the restoration of the competitive status quo which existed between El Paso and the Pacific North-

[41]El Paso's Motions, p. 5.

[42]Ibid., p. 6.

[43]See Edison's Jurisdictional Statement, pp. 17-20.

west Pipeline Corporation ("Pacific Northwest") *which this Court specifically recognized* in its decision wherein it issued a mandate to the District Court to order divestiture without delay,[44] (and with which the Government was deeply concerned prior to entering into the stipulation with El Paso),[45] and that such interest, in view of the abrupt abandonment by the Government after the close of the divestiture hearing, of certain of the antitrust issues being litigated, can only be protected by the exercise of the jurisdiction of this Court to see that its mandate is carried out.

The timeliness of Edison's application to intervene is supported by the same circumstances which gave rise to the inadequate representation of Edison's interests by the Department of Justice (one of the requirements for intervention under FRCP Rule 24(a)(2)), i.e. the abandonment by the Department of Justice, after the close of the divestiture hearing, of substantially all of the objections the Government had previously, forcefully, raised in its opposition to El Paso's proposed plan of divestiture, including its objections going to both the question of the willingness and to the question of the ability of the New Company to compete for the California market.[46]

---

[44] *United States v. El Paso Natural Gas Co., et al.*, 376 US 651, 12 L.Ed. 2d 12.

[45] See Plaintiff's (Government's) Memorandum filed January 6, 1965, pp. 6-8 (see footnote 13, above, and footnotes 46 and 48, below).

[46] Cf. p. 12 of Plaintiff's (Government's) Brief filed January 6, 1965, Opposing El Paso's Plan of Divestiture wherein the Government stated, referring particularly to the inadequate and unfair allocation of the San Juan gas reserves to the new company: "... this proposed course of action would serve to impede and postpone the possible competitive thrust of New Company into the California market" and at p. 13 of that same Brief the

(note continued on next page)

In its brief dated December 4, 1964, filed with the District Court on January 6, 1965, at page 25, the Government's position during the hearings before the District Court as to the type of decree which should be entered was clearly set forth as follows:

"The Government's Proposal

In the preceding sections of this brief, we have demonstrated that in its most important provisions El Paso's Plan of Divestiture fails to provide appropriate relief. Instead, the Government proposes its own decree, the principal terms of which are:

1. El Paso is ordered to divest itself of the assets described in its Plan of Divestiture and, in addition, of (a) a fair share of gas reserves acquired in the San Juan Basin since January 1, 1957, the date of the stock acquisition; (b) the 1,157,125 shares of common stock in Westcoast Transmission Company, Ltd. which were acquired as part of the merger; and (c) a fair share of the value of the tax losses of Pacific Northwest received by El Paso as a result of the merger.

2. All contracts between El Paso and Pacific Northwest existing at the date of the merger, December 30, 1959, are to be reinstated, subject to such modifications as the Federal Power Commission may make in the exercise of its jurisdiction.

3. Such assets are to be divested at a date and to a purchaser to be determined by further order of the Court.

Government stated: "In order that New Company will be in a position to compete for a share of the California market it must have at its command gas reserves in excess of what is proposed to be turned over to it by El Paso through the divestiture proceeding". (Emphasis added.)

4. The Court will schedule hearings on proposals by persons interested in purchasing the assets and operating the facilities to be divested."[47]

As previously pointed out, we are not here involved with a subsequent stipulation which resolved all of the antitrust issues by means of a settlement compromising related matters. The abandoned positions (including the first three listed above) were not by their nature capable of being withdrawn without sacrificing this Court's mandate. The abandoned issues concerned the disposition of the assets and physical properties and related to the *ability* to compete. No arrangement with respect to the "spin-off" of the stock in the New Company, however successful in establishing corporate independence and the *will* to compete, could cure the weaknesses imposed upon the New Company by the abandonment of the issues concerned with the *ability* to compete and the failure to restore such competitive ability as existed before the stock acquisition and merger as required by the mandate of this Court.[48]

---

[47]In this connection reference is made to the curious statement in footnote 10 on page 7 of the Motions of El Paso Natural Gas Company to Dismiss or Affirm.

[48]See Plaintiff's (Government's) Brief filed January 6, 1965, opposing El Paso's proposed plan of divestiture, p. 14, where it is stated:

> "The consequences of the antitrust violation, which the Supreme Court decision was designed to rectify, would instead be perpetuated unless New Company is able to enjoy the fruits of the development of San Juan Basin gas reserves in which Pacific Northwest would have participated had it not been for the unlawful acquisition by El Paso of its stock."

and Plaintiff's (Government's) Brief After Divestiture Hearings, filed February 19, 1965, page 14, where the Government stated:

> "It is clear that without the additional gas requested by the government New Company will not be able to compete with El Paso for the California market." (Emphasis added.)

(note continued on next page)

Because of the Government's position that these issues involving the strength of the New Company's reserves and its financial soundness can be resolved by the Federal Power Commission,[49] we might point out that although El Paso saw fit to supplement its original Motions to Dismiss or Affirm the Appeals[50] of the Cascade Natural Gas Corporation and the State of California to apprise this Court of the subsequent entry of the Decree of Divestiture by the District Court and the filing of the various applications with the Federal Power Commission pursuant to said Decree, it has neglected to bring to this Court's attention (1) that the Federal Power Commission Staff has filed motions objecting to the lack of independent action by the New Company even in presenting evidence, and (2) the fact that El Paso has opposed Edison's and Transwestern Pipeline Company's intervention in the latter proceedings on the grounds, among other things, that the antitrust aspects of the divestiture are *not* within the jurisdiction of the Federal Power Commission, stating, "The antitrust aspects of this case have been fully heard and decided,

---

In the same brief at page 25, with reference to the failure of El Paso's plan to allocate the Westcoast Transmission Co. stock (previously owned by Pacific Northwest) to the new company, the Government said:

> "El Paso's failure to allocate additional equity capital to New Company by returning these Westcoast shares—or assets of equal value—will also tend to block New Company from competing with El Paso in the California market." (Emphasis added.)

In addition, and with reference to El Paso's failure under its proposed plan of divestiture to compensate the New Company for the huge tax loss carryovers which El Paso acquired from Pacific Northwest and utilized, the Government, at pages 27-28 of the same brief, indicates its position that such failure further weakens the New Company's ability to expand into the California market.

[49]Government's Motion, p. 3 (footnote).

[50]Nos. 79 and 82, respectively, this term.

they are not within the jurisdiction of this Commission . . ."[51] El Paso, in that proceeding, has taken such position with respect to *the very same issues* which the Department of Justice, in attempting to justify its abrupt change in position in the divestiture proceeding before the District Court argued *could be* resolved by that Commission.[52]

Thus the "lateness" of Edison's attempt to participate in the proceedings below is a direct function and consequence of the lateness in the abrupt change in position of the Department of Justice *after* the conclusion of the divestiture hearing before the Court below. Both the timeliness of Edison's application for leave to intervene and its protectible interest of preserving a right of appeal are clearly supported by the *Pellegrino*[53] and *Wolpe*[54] cases cited by Edison in its Jurisdictional Statement.[55]

El Paso's Assertion That Edison's Appeal Was Not From the Decree of the District Court Ordering Divestiture Is Without Merit.

The cynical nature of El Paso's position[56] that Edison did not "purport" to appeal from the Decree of the District Court is made transparent by El Paso's later suggestion[57] that denying party status to a would-

---

[51]Page 2 of El Paso's Answer to Petition of Transwestern Pipeline Co. for Leave to Intervene in FPC Docket CP66-27, et al.

[52]Government's Motion to Dismiss the State of California's and Cascade's Appeals, p. 14, Docket Nos. 79 and 82 respectively, this term; Cf. Edison's Jurisdictional Statement, p. 19.

[53]*Pellegrino v. Nesbit*, 203 F.2d 463.

[54]*Wolpe v. Poretsky*, 144 F.2d 505, Cert. Den. 323 US 777.

[55]Edison's Jurisdictional Statement, p. 21.

[56]El Paso's Motions, p. 3.

[57]Ibid., p. 8.

be intervenor also deprives that person of the right of appeal. In any event, such contention by El Paso is not supported by the facts. Edison's Notice of Appeal filed July 23, 1965, specifically raised,[58] along with the question of the propriety of the District Court's denying Edison intervention under FRCP Rules 24(a) and (b), the question of compliance of the decree of divestiture with this Court's mandate in ruling on the original appeal to this Court from the District Court's decision in the antitrust case.[59] This same issue was included in the questions presented to this Court by this appeal in Edison's Jurisdictional Statement[60] and the latter pleading by Edison specifically stated that Edison, in this appeal, "seeks review by this Court of the decree of divestiture entered therein by the District Court on June 24, 1965."[61]

To argue that this appeal does not raise the issue of the propriety of the decree on the merits, as El Paso apparently attempts to do, is an effort improperly to limit the scope of the issues before the Court in this appeal, and ignores completely the clear substance of Edison's Notice of Appeal and Jurisdictional Statement. The argument is doomed to failure on at least two bases because (1) there is authority that an appeal from an order denying intervention where, as here, the decree had been issued prior to the filing of the appeal should be treated as an appeal from the District Court's final decree—even when not specifically included within the

---

[58]Edison's Notice of Appeal, p. 3.

[59]*U. S. v. El Paso Natural Gas Co., et al.*, 376 US 651, 12 L.Ed. 2d 12.

[60]Edison's Jurisdictional Statement, pp. 6-7.

[61]Ibid., p. 1.

scope of the would-be intervenors' pleadings,[62] and (2) this Court has plenary jurisdiction to see that its mandate is carried out when brought to the Court's attention in any proper way.[63]

El Paso's assertion, without citation of any authority, that the District Court's Decree of Divestiture has become final is equally without merit inasmuch as all three of the pending appeals in this proceeding were filed before the expiration of the period allowed for the filing of appeals under the statute.[64] Moreover, the existence of plenary jurisdiction in this Court to review the action of the Court below in regard to its compliance or lack of compliance with this Court's earlier mandate negates any finality in the decree of the District Court when its inadequacy to carry out such mandate is brought to this Court's attention "in any proper way"—as it most certainly was by the filing of this appeal within the period prescribed by the rules.[65]

El Paso's Contention That Edison Was Accorded All the Rights of a Party by the Court Below Is Without Merit.

El Paso at pages 7-8 of its Motions asserts that the Court below accorded Edison every right it would have had as a party *except* what it chooses to designate "the right to abort the proceedings by starting them all over again as they were coming to a close and the right to obstruct by appealing from the Decree". This is its sarcastic way of admitting that Edison was denied

---

[62] *Allen Calculators, Inc. v. Nat. Cash Register Co.*, 322 US 137, 88 L.Ed. 1188, at page 1192.

[63] *Continental Ins. Co. v. United States*, 259 US 156, 66 L.Ed. 871, 881-2.

[64] Title 28 USCA Sec. 2101(b).

[65] Ibid.

the right to intervene and participate as a party and the right to present evidence and to appeal. The right to present evidence and the right to appeal are each so essential to the requirements of due process as to make the denial of either such right alone a denial of any meaningful participation in the proceeding.[66]

El Paso's contention that Edison sought to start the proceedings all over cannot be ignored by this brief since it is so obviously contrary to Edison's request and objectives in seeking intervention. Edison made it plain in its application[67] that it merely wished to call the District Court's attention to the defects in the plan of divestiture referred to in the stipulation between El Paso and the Justice Department (and later incorporated in the District Court's decree) wherein such plan of divestiture not only failed utterly to re-establish the competitive situation with regard to natural gas supply service to the California market as that situation existed prior to the unlawful stock acquisition and merger of El Paso and Pacific Northwest but was designed effectively to foreclose, as a practical matter, the New Company from the California market for the indefinite future, and would therefore work precisely the opposite result the mandate of this Court was intended to achieve. The evidence which Edison sought to present was estimated to take no more than one or two days.[68]

Miscellaneous.

We will deal summarily with El Paso's efforts to divert this Court's attention from the true issues before it by injecting into this appeal its argument con-

---

[66]Cf., *Pellegrino v. Nesbit*, 203 F.2d 463; *Wolpe v. Poretsky*, 144 F.2d 505, cert. den. 323 US 777. Also see *Brotherhood of R.R. Trainmen v. B. & O. R.R. Co.*, 331 US 519, 91 L. Ed. 1646, referred to *supra*, p.15.

[67]Edison's Application for Leave to Intervene, p. 5.

[68]Edison's Application for Leave to Intervene, p. 5.

cerning the relationships of Edison and Tennessee Gas Transmission Company arising out of Edison's effort to acquire a satisfactory gas supply arrangement, which Edison was unable to accomplish with El Paso and its California distributors. As stated by counsel for Edison before the District Court:[69]

> "The Southern California Edison Company was interested in competition from out-of-state suppliers before Gulf Pacific was ever thought of. That is the project in which Tennessee and Edison is interested and it will be interested in competition from out-of-state suppliers after the Gulf Pacific Project is certificated."

The restoration of competition among potential suppliers of the California gas market, is so obviously in the best interest of all energy consumers in California, both gas and electric, that Edison's motivations in seeking to secure and insure the restoration of such competition need no elaboration nor defense. However, because of the cost and complexity of such supply arrangements, only users with substantial requirements can provide the market support for new competing pipelines, and thus Edison, because of the magnitude of its fuel requirements, is in a unique position to bring the benefits of such competition to all southern California fuel users.

Finally, we feel constrained to point out the patent inaccuracy of footnote 13 in El Paso's Motions.[70] Specifically Edison's allegation in its Jurisdictional Statement that it "is informed and believes and therefore alleges that the United States Department of Justice has,

---

[69]Transcript of June 24, 1965, p. 64.

[70]At p. 9.

subsequent to the submission of the divestiture proceedings in the District Court, taken the position that the aspects of the El Paso proposed plan of divestiture, to which it previously voiced serious objection and has since abandoned, can be adequately remedied through the exercise of the Federal Power Commission of its jurisdiction in the certificate proceedings" was based upon documents of record before this Court and Edison's Jurisdictional Statement so indicated.[71] This position of the Department of Justice was corroborated by the other comments made by a representative of the Government which were referred to.[72]

Conclusion.

It is respectfully submitted that confronted with (1) a decision by a District Court Judge reflecting his view that this Court's mandate would be met by a proposal designed to effect "a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso",[73] a position which appears to be approximately 180° out of phase with the clear purpose of this Court's mandate, (2) the abrupt change of position of the Department of Justice in entering into the stipulation, after the close of the hearings, which involved the extraordinary abandonment of most of the antitrust issues in the case, and

---

[71]Edison's Jurisdictional Statement, p. 19, footnote 23, referring to the Department's Motion to Dismiss the State of California's and Cascade Natural Gas Corporation's Appeals, p. 14.

[72]In this connection El Paso before other forums has subsequently *denied* such jurisdiction lies with the Federal Power Commission. See pp. 29-30, *supra*.

[73]Divestiture Hearing Transcript for December 10, 1964, pp. 620-1.

(3) the denial of any participation in the proceedings, as a party, of any and all of the other interested entities, this Court should review the matter to assure that its mandate will not be frustrated by what has taken place.

Respectfully submitted,

ROLLIN E. WOODBURY,
HARRY W. STURGES, JR.,
WILLIAM E. MARX,
By ROLLIN E. WOODBURY
Attorneys for Appellant, Southern California Edison Company.

Of Counsel:
SENIOR & SENIOR,
RAYMOND T. SENIOR,
FRANCIS M. GIBBONS.